Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

OCTOBER TERM, 1995

HARRIS JARREAU
PETITIONER

V.

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR, TOWING COMPANY ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM LIMITATION OF LIABILITY
RESPONDENT

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF
RESPONDENT

CERTIORARI TO THE
SUPREME COURT OF LOUISIANA
FROM THE ORDER DATED MARCH 20, 1995

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENT FOR REVIEW

QUESTION NUMBER 1

WHEN TWO VESSELS COLLIDE AND A CREWMAN FILES A PERSONAL INJURY CLAIM IN STATE COURT, SHOULD THE CREWMAN, WHO IS A SEAMAN WITHIN THE MEANING OF THE JONES ACT (46 USC 688), BE DEPRIVED TO HIS/HER RIGHT TO A JURY TRIAL IN STATE COURT UNDER THE SAVINGS TO SUITORS CLAUSE OF THE JUDICIARY ACT, IF HIS/HER EMPLOYER FILES FOR LIMITATION OF AND OR EXONERATION FROM LIABILITY PURSUANT TO 46 U.S.C. Sec. 181?

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OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. On December 29, 1993, the United States District Court of the Western District of Louisiana rendered a Judgment, a full copy of which is included as Appendix D.

2. On January 18, 1995, the United States Court of Appeals, Fifth Circuit rendered an opinion affirming the Judgment of Western District Court, a full copy of which is included as Appendix C.

3. On March 20, 1995, on direct appeal from the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit Court of Appeals entered the following order: (Appendix G-23)

> "The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED."

STATEMENT OF JURISDICTION

Petitioner seeks review by way of a Petition for Writ of Certiorari to a judgment rendered, in a direct appeal, by the United States Court of Appeal, Fifth Circuit. Appeal Docket, 1995 on January 18, 1995. (Appendix C @ A-9)

Jurisdiction of this Honorable Court is invoked under the provisions of Section 28 United States Court of

Appeal Sec. 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court of the United States, which provided for the granting of a Writ of Certiorari, inter alia, when:

> "...A United States Court of Appeal...has decided a federal question in a way that conflicts with applicable decisions of [the Supreme] Court."

CONSTITUTIONAL GUARANTEES APPLICABLE TO THIS CASE

(1) The right to trial by jury pursuant to the 7th Amendment of the United States Constituion.

STATUTES

(1) The Merchant Marine Act; 46 U.S. CA Sec. 688.

(2) The Savings to Suitors Clause of the Judiciary Act of 1789.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below

On the night of June 15, 1991, there was a stern end collision between a towboat owned by respondent John W. Towing, Inc. (hereinafter referred to as "John W.") and another towboat owned by respondent PORT AUTHOR TOWING COMPANY (hereinafter referred to as "PATCO"). The M/V JOHN W. (owned by respondent John W.) was being piloted by Harris Jarreau. The M/V MISS CAROLYN (owned by respondent PATCO) pushed her

barges into and over the stern of the M/V JOHN W. The entire crew of the John W. filed injury claims. (Appendix C @ A-11 & 12).

On December 9, 1991, Harris Jarreau filed a Seaman Suit for injuries with the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, bearing Docket No. 426-445. On December 26, 1991, respondents brought separate complaints in the United States District Court, Western District of Louisiana, Lake Charles Division, for Exoneration or Limitation of Liability; said complaint bearing Civil Action Nos. CV 91-2591 and CV 91-2693. With the filing of the aforementioned complaints in United States District Court for the Western District of Louisiana, a Stay Order on December 12, 1991 was issued as to PATCO and on December 26, 1991 as to John W. was issued restricting prosection of all claims. The 24th Judicial District Court signed on April 13, 1992, a Judgment staying the entitled civil action pending the disposition of CV 91-2591 in the United States District Court.

During the course of the litigation a Motion to Lift the Stay was filed by Harris Jarreau and Joshua Verdin (another claimant) on May 10, 1993. Both Joshua Verdin and Harris Jarreau wished to proceed with their claims in the forum of their choice. This Motion was denied on May 21, 1993. (Appendix A A-1). This motion was denied because respondent John W. also had made a claim against respondent PATCO in these proceedings for maintenance and cure benefits. While Harris Jarreau and Joshua Verdin were willing to enter into the appropriate stipulation to protect the respondents' rights in limitation, John W. was not willing to enter into the stipulation which is what the

District Court relied on in refusing to lift the stay order. (See Appendix C @ A-13 and 14). Subsequently, a trial on the merits regarding the issued of exoneration and limitation was held on June 30, 1993. After considering the testimony of the witness as well as documents introduced at trial, the Court ruled that John W. was entitled to exoneration from liability and that PATCO was not entitled to either exoneration and/or limitation of liability. The Court gave both oral and written reasons for its ruling. Subsequently, upon reconsideration, the Court reversed itself and found that PATCO was entitled to limitation of liability and gave written reasons. (Appendix C @ A-15). The Court then scheduled a hearing without a jury on damages, which took place on November 8, 1993. Harris Jarreau requested jury trial on these issues. However a motion to strike the Jury was granted and the Court decided the damage claims of claimants, Harris Jarreau and Joshua Verdin. (Appendix E @ A-21 and Appendix F @ A-22).

After reviewing the various documents and considering the testimony of the witnesses, the Court found that Harris Jarreau's injuries which included a low back fusion by Dr. Jackson, were not caused by the accident in question. The Court awarded Joshua Verdin $12,000.00 and exonerated PATCO from liability to Harris Jarreau. (Appendix B @ A-4-8)

Included in these proceedings were the settled claims of Adam East, Jr. and Gerald Prejeant, Jr., (the other crewmen aboard the M/V JOHN W.) which were compromised and settled by funding between PATCO and John W. PATCO and John W. reserved their rights, one against the other, on all issues, including the apportion-

ment of liability between those parties and the right of John W. to recover from PATCO those amounts it has paid to Messrs. East and Prejeant by way of maintenance and cure and settlement.

B. Statement of Facts.

On the night of June 15, 1991, at approximately 2335 hours, the M/V JOHN W., a towboat owned and operated by John W., was proceeding eastbound on the Intracoastal Waterway near Intracoastal City, Louisiana, at approximately Mile 185. The M/V JOHN W. had three barges in her tow, strung out one in front of the other. At the aforesaid time, the M/V MISS CAROLYN, a towboat owned and operated by PATCO, was also proceeding eastbound on the Intracoastal Waterway but was astern of the M/V JOHN W. The M/V MISS CAROLYN, which was travelling at a speed in excess of the M/V JOHN W.'s speed, attempted to overtake and pass the M/V JOHN W. During the overtaking maneuver, the M/V MISS CAROLYN collided with and ran squarely over the stern of the M/V JOHN W., causing substantial damage to the M/V JOHN W. Furthermore, as a result of the collision, all four crewmembers, Harris Jarreau, Joshua Verdin, Adam East, Jr. and Gerald Prejeant, Jr., aboard the M/V JOHN W. made claims for personal injuries of varying degrees and severity. (Appendix C @ A-11).

Subsequent to the collision, John W., in its representative capacity as owner and operator of the M/V JOHN W., filed its Complaint For Exoneration From or Limitation of Liability in the United States District Court for the Western District of Louisiana. PATCO also filed a Com-

plaint For Exoneration From or Limitation of Liability on behalf of the M/V MISS CAROLYN. Both of these Complaints were consolidated into the present action.

ARGUMENT AND LAW

Question No. 1:

When two vessels collide and a crewman files a personal injury claim in State Court, should the crewman, who is a seaman within the meaning of the Jones Act (46 USC 688), be deprived to his/her right to a jury trial in State Court under the Savings to Suitors Clause of the Judiciary Act, if his/her employer files for limitation of and/or exoneration from liability pursuant to 46 U.S.C. Sec. 181?

It is clear that General Maritime claims, when coupled with a claim under the Jones Act should be tried to a jury. The Supreme Court has held that while remedies for negligence, unseaworthiness and maintenance and cure have different origins which at time may call for the application of different principles and procedures, nevertheless when the claim is based on one set of circumstances they serve the same purpose of indemnifying a seaman for damages caused by injury, in large part upon the same evidence, and involve some identical elements of recovery.[1]

Accordingly, under *Fitzgerald*, it is submitted Jarreau has the right to have all claims in this case tried by a

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[1] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 10 Lawyers Edition 2nd 720, 83 S.Ct. 1646, 1963 AMC 1093 (1963), rehearing denied 375 U.S. 870, 11 Lawyers Edition 2nd 99, 84 S.Ct. 26.

jury in the forum of his choice.

The language of the Jones act specifically gives to the seaman at his election the choice of maintaining an action at law with the right of trial by jury. The selection of this right permits him to trial by jury in a common law forum in a State court.[2]

In motions and in status conferences both Joshua Verdin and Harris Jarreau were willing to stipulate to protect the vessel owners' right to limit liability and abide by the Admiralty Court of the right to limit. As such the Court should have lifted the stay order and allowed them to proceed in State Court.[3] In *Odeco,* supra, the Court states at page 359, referring to the claimants choice of proceeding in State Court:

> "We must accede to this choice if it is accompanied by stipulations fully protecting Odeco's right to limit liability and agreeing to abide by an admiralty court determination of the right to limit. Couched in these terms, Odeco does not confront a multiple claim-inadequate fund lawsuit."

It is well settled law that Harris Jarreau, as a Jones Act Seaman, has the right to try his claims against John W. under the Jones Act and for unseaworthiness and under the General Maritime Law against PATCO to a jury in the

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[2] *Angle v. Davenport,* 271 U.S. 33, 70 Lawyers Edition 813, 46 S.Ct. 410, 1926 AMC 679 (1926); *Panama R. Co. v. Vasquez,* 271 U.S. 557, 70 Lawyers Edition 1085, 46 S.Ct. 596, 1926 AMC 984 (1926).

[3] *Odeco Oil and Gas Co. v. Bonnette,* 4 F.3rd 401 5th Cir. 1993.

forum of his choice. Jarreau initially raised his objection in his answer to the petitions filed by both PATCO and John W. Various motions and conferences were held to lift the stay order to allow Jarreau and Verdin to proceed in State Court under the Savings to Suitors Act of the Judiciary Act of 1789. The District Court denied those motions and then decided issues which Jarreau submits he had the right to be decided by a jury in the forum of his choice. The motion was denied in spite of the fact that Harris Jarreau and Joshua Verdin were willing to enter stipulations preserving PATCO and John W.'s rights in the limitation proceedings. The motion to lift the stay order was denied because John W. refused to enter into the appropriate stipulation. Thus by refusing to enter into the appropriate stipulation John W. effectively denied its Jones Act employee, Harris Jarreau, to proceed in State Court (under the Savings to Suitors) with a trial by jury. Thus, John W. and PATCO were allowed to proceed in the forum of their choice without a jury.

Accordingly, it is submitted that considering the willingness of Harris Jarreau and Joshua Verdin to enter stipulations protecting the owners' rights to limit liability, the District Court should have lifted the stay order and allowed Harris Jarreau to proceed in State Court.

CONCLUSION

It is submitted that a seaman's right to jury trial in the forum of his choice (under Saving to Suitors) should not be denied if the seaman is willing to enter the appropriate stipulation to protect the vessel owners' rights in a limitation proceedings. It is clear from the record herein

that Harris Jarreau and Joshua Verdin were willing to enter into the appropriate stipulation. Accordingly the result in the District Court as well as the opinion of the Court of Appeals of January 18, 1995 should be annulled and this petition for a writ of certiorari be granted and after due proceedings the Judgment be reversed with the appropriate orders allowing Harris Jarreau to proceed in State Court with a trial by jury.

Respectfully submitted by:

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

IN THE MATTER OF	:	CIVIL ACTION
THE COMPLAINT OF	:	NO. 91-2591
PORT ARTHUR TOW-	:	
ING COMPANY, ON	:	JUDGE TRIMBLE
BEHALF OF M/V MISS	:	
CAROLYN, FOR EXON-	:	
ERATION FROM OR	:	MAGISTRATE JUDGE
LIMITATION OF	:	WILSON
LIABILITY	:	

CONSOLIDATED WITH

IN THE MATTER OF	:	CIVIL ACTION
JOHN W. TOWING,	:	NO. 91-2993
INC., AS OWNER AND	:	
OPERATOR OF THE	:	JUDGE TRIMBLE
M/V JOHN W.,PRAYING	:	
FOR EXONERATION	:	MAGISTRATE JUDGE
FROM OR LIMITATION	:	WILSON
OF LIABILITY	:	

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MEMORANDUM RULING

Currently before the court is a Motion to Lift Stay filed by Joshua Verdin.

The court previously denied this motion in a Memorandum Order dated April 22, 1993 on the grounds that this case did not fall within one of the two exceptions to the exclusive admiralty jurisdiction of a federal court which have been established. As explained in that Memorandum Order, the two situations which courts have consistently found to be exceptions to the exclusive jurisdiction of the federal court in Limitation of Liability actions are (1) where there are multiple claimants and an adequate limitation fund; and (2) where there is a single claimant who stipulates to the authority of the federal court to resolve the issues relating to the limitation of liability. *See Magnolia Marine Transport Co. v. LaPlace Towing, Corp.*, 964 F.2d. 1571, 1575 (5th Cir. 1992); *In Re Two "R" Drilling Co.*, 943 F.2d. 576, 578 (5th Cir. 1991); *Luhr Bros. Inc. v. Gagnard*, 765 F.Supp. 1264 (W.D. La. 1991); *In Re Complaint of Dammers & Vanderheide & Scheepvaart Maats ChristiNa B.V.*, 836 F.2d. 750, 755 (2nd Cir. 1988).

The case presently before this court does not fit neatly into either of these exceptions because this case involves multiple claimants and an allegedly inadequate limitation fund. However, "even in multiple-claimant cases, admiralty courts still should allow state court claims to proceed under proper stipulations." *Magnolia Marine Transport*, 964 F.2d. at 1576. Although the parties had entered into some stipulations, the court found that the stipulations

entered into at the time of the previous order were not sufficient to allow the court to lift the stay.

Since the date of the Memorandum Order, the parties have submitted additional stipulations regarding the priority in which their respective claims would be satisfied out of the limitation fund. However, the Claimants cannot agree on the priority of the claim of the two vessel owners arising out of the settlement paid to two claimants. Because of this disagreement, this court had recently been advised by counsel that efforts to enter into additional stipulations have failed.

Although it seems that the jurisdiction of the admiralty court would be protected as long as the parties are willing to stipulate to the fact that they will not execute the state court judgment prior to returning to federal court and that the result in state court wil not have a res judicata or collateral estoppel effect on the proceedings in federal court, this is not the conclusion that courts considering this situation have reached. Courts facing this type of situation have narrowly construed the exceptions which allow admiralty courts to lift the stay on state court proceedings. Despite the fact that this court believes that the stipulations which the parties have entered into at the present time would protect the admiralty jurisdiction of this court, this court feels constrained to deny the motion to lift the stay in light of the case law which evidences an unwillingness of courts to lift the stay on state court actions in the absence of circumstances which cause the cases to fall squarely within one of the two exceptions.

Therefore, this court will continue to enjoin the state

court action and will go forward with the June 30, 1993 trial date. On this date, the court will determine whether Port Arthur Towing and John W. Towing are entitled to limit their liability. If they are, the court will set a date on which the parties can try the remaining issues.

ACCORDINGLY,

IT IS ORDERED that the Motion to Lift Stay is DENIED.

THUS DONE, AND SIGNED in Chambers at Lake Charles, Louisiana, this 21st day of May, 1993.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES MAGISTRATE
JUDGE

APPENDIX B

THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

IN THE MATTER OF	:	CIVIL ACTION
THE COMPLAINT OF	:	NO. 91-2591-LC
PORT ARTHUR TOW-	:	
ING COMPANY, ON	:	JUDGE TRIMBLE
BEHALF OF THE M/V	:	
CAROLYN, FOR EXON-	:	
ERATION FROM OR	:	MAGISTRATE JUDGE
LIMITATION OF	:	WILSON
LIABILITY	:	

CONSOLIDATED WITH

IN THE MATTER OF	:	CIVIL ACTION
JOHN W. TOWING,	:	NO. 91-2693-LC
INC., AS OWNER AND	:	
OPERATOR OF THE	:	JUDGE TRIMBLE
M/V JOHN W., PRAYING	:	
FOR EXONERATION	:	MAGISTRATE JUDGE
FROM OR LIMITATION	:	WILSON
OF LIABILITY	:	

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MEMORANDUM RULING

This court has previously exonerated John W. Towing Company, Inc. (JWT) from liability and has determined that the accident at issue in this case was caused by the negligence of Port Arthur Towing Company (PATCO). (*See* 8/5/93 Memorandum Ruling, record item #134 and 7/2/93 Judgment, record item #144). On November 8, 1993, evidence was heard on the issues of what, if any, injuries plaintiffs sustained in the accident and their damages. Plaintiffs bear the burden of proof on these issues. *Brister v. A.W.I., INC.*, 946 F.2d 350, 355 (5th Cir. 1991).

HARRIS JARREAU

Harris Jarreau (Jarreau) testified that he slipped and fell as he was leaving the wheelhouse after the accident. He also testified that right after the accident he thought he had a pulled muscle in his back. He also indicated that he had an immediate onset of pain in his history to his treating physician, Dr. John Jackson. (Jackson Depo. 7).

However, Wilbur Garner, the captain of the Miss Carolyn, testified that Jarreau told him that he was not hurt in the accident. Robert Gibson was a crew member on the Miss Carolyn. He helped Jarreau and other John W crew members tie off the John W's tow after the accident. Jarreau told Gibson that he was not hurt but that he was gong to sue. Additionally, four to five days after the accident Jarreau gave a statement wherein he denied being injured.

Subsequent to the accident Jarreau was found to

have degenerative disc pathology. The orthopedic surgeon who examined Jarreau at the request of the defendants reviewed x-rays taken less than a month after the accident. These x-rays showed degenerative changes that would have predated the accident by more than a year. (Landry Depo. pp 12-13) Dr. Landry also felt that these changes were probably due to some prior trauma. (Landry Depo. 13). Although Dr. Jackson did not have the benefit of these early x-rays[1] he could not say that the objective pathology was caused by the June 15, 1991 accident. (Jackson Depo. pp 47-48). Both Dr. Landry and Dr. Jackson conceded that a person with such changes could develop symptoms as the result of an accident such as described by Jarreau. (Landry Depo. p.12; Jackson Depo. p.48). However, there is no objective evidence to aid the doctors in determining whether Jarreau, in fact, was injured in the accident at issue. This determination is totally dependant upon Jarreau's credibility when he says that he had no prior back problems but had an onset of pain either immediately or shortly after the accident.[2]

This court does not find Jarreau's testimony about an injury to be credible. As already noted, he made a number of conflicting statements about when he realized that he was injured. At one point during the trial he attempted to explain the inconsistencies by contending that they were somehow related to the fact that his girlfriend

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[1] Jackson Depo. 28

[2] The doctors indicated that usually the onset of pain is immediate. Dr. Jackson testified that it was possible for it to take more than a week for the pain to start. More significant then whether or not the onset of pain was immediate is the conflicting statements given by Jarreau.

had a baby the day after the accident. In this court's view this only lessens his credibility. This court does not believe that the birth of a child would cause him to be confused about whether he was injured when he gave his statement several days later. Further, his manner and demeanor on the stand also weighs against his credibility.

This court finds that Jarreau has failed to establish by a preponderance of the evidence that the June, 1991 accident caused his injury. Therefore, PATCO is exonerated from liability to him.

JWT paid $1,245.00 in maintenance to Jarreau. JWT has cited no authority to justify their recovery of this amount from PATCO where, as here, the evidence does not establish that any injury was caused by PATCO's negligence. JWT's request to be indemnified for maintenance paid to Jarreau is denied.

JOSHUA VERDIN (Verdin)

Verdin was in an upper bunk asleep when the accident happened. He ended up in a bottom bunk. He felt immediate pain in his neck and shoulder and reported this to his employer, Mr. Farley. He was told to remain on the boat and that an appointment would be made with a doctor. This court finds that Verdin sustained a neck injury as a result of the accident. However, the evidence does not indicate that the injury was more serious than a chronic cervical strain.

Verdin helped with the repairs to the Miss Carolyn. After the repairs were completed he continued to work on

the boat for another two weeks. At that time he quit because he was having trouble sleeping on the boat. He went to work on another boat but quit working on that boat due, once again, to his inability to sleep on the boat. Thereafter, he went to work at Wal-Mart where he has continued to work up until the present time. He did not see a doctor until his attorney sent him to a chiropractor approximately eight (8) months after the accident. He has been seen by a number of doctors. However, only the depositions of Drs. Warren, Pulliam and Landry are in evidence.

Dr. Pulliam is the chiropractor who first saw the plaintiff on February 5, 1992. He last saw the plaintiff on April 27, 1992. Dr. Warren is an orthopedic surgeon who saw the plaintiff first on December 2, 1992. He last saw Verdin in October of this year and was of the opinion that Verdin had a chronic cervical strain. (Warren Depo. 47).

This court finds that an award of $12,000 will fairly compensate Verdin for his injuries. JWT is entitled to recover $7,969.89 from PATCO representing cure paid. All amounts fall well within the limitation fund of $95,000.

Counsel for PATCO shall submit a judgment to the court in accordance with this ruling within ten (10) days of this date after having previously furnished a copy of the proposed judgment to all other counsel.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 10th day of December, 1993.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 12-13-93
BY LN
TO Braud
Robin
De Sonier
Bland
H. Lundy

APPENDIX C

In the Matter of the Complaint of PORT ARTHUR TOWING CO. on Behalf of the M/V MISS CAROLYN for Exoneration from or Limitation of Liability.

PORT ARTHUR TOWING CO., etc., Plaintiff-Appellee,

v.

JOHN W. TOWING, INC., et al., Defendants,

Harris Jarreau, Defendant-Appellant,

and

Joshua Verdin, Defendant-Appellee.

In the Matter of JOHN W. TOWING, INC., as Owner and Operator of the M/V JOHN W., Praying for Exoneration from or Limitation of Liability

A-12

JOHN W. TOWING, INC., etc.,
Plaintiff-Appelle,

v.

Gerald PREJEANT, et al., Defendants,

Harris Jarreau, Defendant-Appellant,

and

Joshua Verdin, Defendant-Appellee,

No. 94-40102
(Summary Calendar).

United States Court of Appeals,
Fifth Circuit.

Jan. 18, 1995.

Owners and operators of vessels involved in collision filed suit under Limitation of Liability Act, seeking to limit liability to values of respective vessels. The United States District Court for the Western District of Louisiana, Alonzo P. Wilson, United States Magistrate Judge, stayed concurrent state court actions, and found that both shipowners were entitled to exoneration from liability for claims of seaman involved in accident. Seaman appealed. The Court of Appeals held that: (1) absent stipulation adequate to protect shipowners' right to limit liabilities, stay of seaman's state court action could not be lifted, and (2) seaman failed to prove that collision caused his back in-

jury, thus exonerating shipowners from liability.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana.

Before DUHE', WIENER and STEWART, Circuit Judges.

PER CURIAM:

A collision of two barge tows resulted in injuries to the vessels and some crew members. Owners and operators of the two vessels involved in the collision filed suit under the Limitation of Liability Act (the "Act")[1] in federal district court seeking to limit their respective liabilities to the values of the respective vessels. The district court held that the shipowners were entitled to limit their liability and thus stayed concurrent state court action involving the incident. The district court subsequently held, inter alia, that both shipowners were entitled to exoneration from liability to one of the claimants—Defendant-Appellant. Harris Jarreau—as he had failed to prove medical causation, *i.e.*, that he was injured in the accident. Jarreau appealed, arguing that the court erred by (1) staying state court proceedings, and (2) concluding that both shipowners were entitled to exoneration from liability for his claims. Finding no error, we affirm.

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[1] 46 U.S.C. app. §§ 181-196 (1988).

I

FACTS AND PROCEEDINGS

Underway at night, the lead barge in the tow of the M/V MISS CAROLYN, a vessel owned by the Port Arthur Towing Company, Inc. ("PATCO"), rammed the stern of the M/V JOHN W., a vessel owned by John W. Towing, Inc. ("JWT"). As a result of this collision, several seamen, including Jarreau and Defendant-Appellee Joshua Verdin, both serving on the M/V JOHN W. at the time, filed suit in state court stating claims under the Jones Act and General Maritime Law for injuries that they allegedly suffered in the mishap.[2]

In response, JWT and PATCO filed separate limitation complaints in federal district court, invoking that court's admiralty jurisdiction and praying for exoneration from or limitation of liability on claims arising from the collision. These actions were consolidated, after which JWT filed a cross claim against PATCO seeking indemnification, court costs, and attorneys' fees. All parties agreed to have the cases adjudicated by a magistrate judge.

A concursus was deposited into the registry of the district court, which then issued an order staying all related state court proceedings. Jarreau, Verdin, and JWT tried to negotiate a mutually agreeable stipulation that would enable Jarreau and Verdin to have the stay lifted and pursue their claims in state court. Agreement on a

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[2] Claims also were made by Adam East, Jr. and Gerald Prejeant, Jr. PATCO, JWT, East and Prejeant reached a settlement so their claims are not involved in this appeal.

mutually acceptable stipulation could never be reached, however, so the three parties voluntarily abandoned their efforts to produce such a stipulation. Eventually Jarreau and Verdin—but not JWT—did enter into a stipulation, then moved the court to lift the order staying the state court actions. But as JWT was not a party to the agreement, the court denied this motion.

The district court conducted a hearing, at the conclusion of which it exonerated JWT from all liability and found PATCO solely responsible for the collision. The magistrate judge then determined after a bench trial that Jarreau had not proved that he sustained any injury as a result of the collision; thus PATCO was entitled to exoneration from Jarreau's claim.

The court found that, although Jarreau chronically suffers from degenerative disc pathology, his condition did not result from the collision but antedated it. Dr. Edmund C. Landry, Jr., an orthopedic surgeon who examined Jarreau at the request of PATCO and JWT, stated that x-rays of Jarreau's back taken less than a month after the accident showed that the degenerative change predated the accident by more than a year and probably resulted from some prior trauma. Dr. John D. Jackson, Jarreau's treating physician who did not review the x-rays, could not say that the objective pathology was caused by the collision. Jarreau testified that he had no prior back problems and that his back started hurting either immediately or shortly after the accident.

After considering this evidence, the court concluded that "there is no objective evidence to aid the doctors in

determining whether Jarreau, in fact, was injured in the accident at issue. This determination is totally dependent upon Jarreau's credibility when he says that he had no prior back problems but had the onset of pain either immediately or shortly after the accident." The court then considered evidence bearing on Jarreau's credibility.

In the court's recap of that evidence, it noted that (1) the captain of the M/V MISS CAROLYN testified that immediately after the accident Jarreau stated that he was not injured; (2) another crew member of the M/V MISS CAROLYN testified that Jarreau told him that he was not injured, but that he was going to sue anyway; and (3) four to five days after the accident Jarreau gave a statement in which he denied being injured. In addition to these statements, which were inconsistent with Jarreau's trial testimony, the court noted tht Jarreau's manner and demeanor on the witness stand weighed against his credibility. Accordingly, the court found Jarreau's testimony not credible and ruled that he had failed to establish that he was injured in the collision.

Jarreau appealed, contending that the court erred in denying his motion to lift the order staying the state court proceedings, and in finding that PATCO and JWT were entitled to exoneration from liability for his claims, because Jarreau had failed to prove that the collision caused his injuries.[3]

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[3] PATCO appealed too, contending that the district court erred in awarding $12,000 to another seaman; but PATCO's appeal was subsequently dismissed on PATCO's unopposed motion.

II

ANALYSIS

A. STAYING THE STATE COURT PROCEEDINGS

A shipowner facing potential liability for a maritime accident may file suit in federal court seeking protection under the Act, a statute that permits a shipowner to limit his liability for damages or injuries arising from a maritime accident to "the amount or value of the interest of such owner in such vessel, and her freight then pending,"[4] if the accident occurred without the shipowner's "privity or knowledge."[5] When a shipowner files a complaint seeking limited liability, the federal district court stays all related claims against the shipowner pending in any forum, and requires all claimants to assert their claims in the limitation court."[6] This accords with the federal courts' exclusive jurisdiction of suits brought under the Act.[7]

[1] Although it has granted such exclusive jurisdiction to the federal courts, Congress has also " 'sav[ed] to suitors ... all other remedies to which they are otherwise entitled' " (the "saving-to-suitors clause").[8] We have

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[4] 46 U.S.C. app. § 183(a).

[5] *Id.*

[6] *Magnolia Marine Transp. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992) (citing *In re Dammers & Venderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir.1988)).

[7] *See* 28 U.S.C. § 1333.

[8] *Magnolia Marine Transp.*, 964 F.2d at 1575 (quoting § 1333).

previously recognized that "this statutory framework has created 'recurring and inherent conflict' between the saving-to-suitors clause, with its 'presumption in favor of jury trials and common law remedies,' and the 'apparent exclusive jurisdiction' vested in the admiralty courts by the Act."[9] In connection with this tension, we have noted that "[t]he court's primary concern is to protect the shipowner's absolute right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum."[10]

[2] The Act therefore is directed at maritime misfortunes in which the losses claimed exceed the value of the vessel and its freight.[11] But when a shipowner is not exposed to potential liability in excess of that amount, the shipowner's absolute right to limit its liability is not implicated and "the saving-to-suitors clause dictates that the admiralty court *must* allow suits pending against the shipowner in a common law forum, in this case the state court, to proceed."[12] Over the years, courts have identified several exceptional circumstances in which a district court must permit a state law action to proceed, even though a limitation action has been filed in federal court. Today we

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[9] *Id.* (quoting *In re Dammers & Venderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d at 754); *see Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 404 (5th Cir. 1993) (*citing Magnolia Marine Transport*), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1370, 128 L.Ed.2d 47 (1994).

[10] Magnolia Marine Transp., 964 F.2d at 1575 (citing *Langnes v. Green*, 282 U.S. 531, 543, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931)).

[11] *Id.* (citing *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151, 77 S.Ct. 1269, 1271, 1 L.Ed.2d 1246 (1957)).

[12] *Id.* (citing *Lake Tankers Corp.*, 354 U.S. at 150-54, 77 S.Ct. at 1271-73).

must determine whether the district court was here faced with such a situation.

1. *When A Stay Is Appropriate*

[3] As we recently explained, "[c]laims may proceed outside the limitations action (1) if they total less than the value of the vessel, or (2) if [all] claimants stipulate that the federal court has exclusive jurisdiction over the limitation of liability proceeding and that [the claimants] will not seek to enforce a greater damage award until the limitation action has been heard by the federal court."[13] In this case, multiple claimants sought more in damages than the total value of the vessels and their pending cargo; thus, to proceed in state court, all claimants were first required to enter into a stipulation that would protect the shipowner's right to limit its liability.

2. *Adequacy of the Stipulations*

[4] The district court denied Jarreau's motion to lift the order staying his state court action, finding that the claimants had not entered into a stipulation sufficient to protect PATCO's interests. Jarreau argues that this was error, insisting that both he and Verdin, the only other crew member remaining in the suit at that time, had proposed an adequate stipulation.

But the record is clear that the stipulation proposed

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[13] *Odeco Oil & Gas Co.*, 4 F.3d at 404 (citing *Lake Tankers Corp.*, 354 U.S. at 151-53, 77 S.Ct. at 1271-72); *see In re Two "R" Drilling Co.*, 943 F.2d 576, 578 (5th Cir.1991) (analyzing sufficiency of claimants' stipulations).

by Jarreau and Verdin was inadequate to protect PATCO's right to limit its liabilities: That agreement would not have bound all necessary parties. Even though they eventually agreed between themselves to the terms of a proposed stipulation, Jarreau and Verdin never convinced JWT to enter into it. Yet JWT was a codefendant with a cross claim against PATCO seeking damages, attorneys' fees and costs. Indeed, the fact that Jarreau, Verdin, and JWT were unable to arrive at an acceptable stipulation among themselves was confirmed when they informed the district court that they had abandoned all efforts to obtain a mutually agreeable stipulation, after which Jarreau and Verdin proceeded to try their cases before that court.

On this point the law is clear: When the aggregate of the damages being sought by all claimants exceeds the value of the concursus, actions in state court cannot proceed unless *all* claimants enter into a stipulation that adequately protects the shipowner which has filed a complaint in federal court seeking to limit its liability.[14] We recently stated that a "claimant" in this context includes a codefendant who is asserting a cross claim for indemnification, costs, and attorneys' fees.[15] As none dispute that JWT was doing precisely that, or that JWT refused to enter into a stipulation with Jarreau and Verdin, PATCO would have

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[14] *See Odeco Oil & Gas Co.*, 4 F.3d at 405 n. 7.

[15] *Id.* at 405 (vacating and remanding stay of limitation proceeding so that the district court could consider implications of codefendant's potential cross claim for contribution or indemnification); *see also Gorman v. Cerasia*, 2 F.3d 519, 525 (3d Cir.1993) ("[A]ll courts have recognized that a multiple claimant situation exists where a third party seeking indemnity or contribution also requests attorneys' fees and costs associated with its claim").

been exposed to a multiple claimant/inadequate fund situation had Jarreau been permitted to pursue his action in state court.[16] Clearly, then, the trial court would have abused its discretion had it lifted its earlier order staying Jarreau's state court proceeding.[17] In sum, not only was the district court's decision to deny Jarreau's motion to lift the stay entirely proper, it was required by law.

B. JARREAU'S INJURY: MEDICAL CAUSATION

Jarreau argues that the district court's exoneration of both PATCO and JWT from liability for Jarreau's injury must be reversed. He urges that court made errors of fact and law. "We independently review a district court's conclusions of law. We may reverse its findings of fact, however, only if we determine that they were clearly erroneous."[18] We consider whether Jarreau proved that the collision caused his back injury, entitling him to receive compensation from the concursus.

[5] As noted earlier, a limitation proceeding generally comprises a two-step orocess,[19] the first being "the

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[16] *Odeco Oil & Gas Co.*, 4 F.3d at 405; *Gorman*, 2 F.3d at 525.

[17] *See Gorman*, 2 F.3d at 523 ("[W]here a shipowner demonstrates that his or her right to limit liability would be prejudiced, the court's lifting of the stay constitutes an abuse of discretion.") (citing *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir.1979) and *S & E Shipping Corp. v. Ohio Ry. Co.*, 678 F.2d 636, 647 (6th Cir.1982) (Kennedy, J., concurring)).

[18] *Brister v. A.W.I., Inc.*, 946 F.2d 350, 354 (5th cir.1991).

[19] *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 15-5, at 305-06 (2d ed. 1994) (describing typical limitation proceeding).

establishment of liability of the shipowner to the claimant, as to which the claimant (or libellant) bears the burden."[20] "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit."[21] Thus Jarreau was required initially to prove facts supporting his claim that PATCO was liable to him for his alleged injury.[22]

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[20] GRANT GILMORE & CHARLES L. BLACK, JR. THE LAW OF ADMIRALTY 895 (2d ed. 1975); *see In re Hechinger*, 890 F.2d 202, 207 (9th Cir.1989) (stating that in a limitation proceeding, the claimant bears the initial burden of showing that "[a] *liability* ...exist[s]" (emphasis added)), *cert. denied*, 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 103 (1990); *The 84-H*, 296 F.427, 431-32 (2d Cir.1923) ("[I]n a proceeding to limit liability ... the first [duty] is to ascertain whether any *liability* exists." (emphasis added)), *cert. denied*, 264 U.S. 596, 44 S.Ct. 454, 68 L.Ed. 867 (1924); *In re Lloyd's Leasing Ltd.*, 764 F.Supp. 1114, 1141 (S.D.Tex. 1990) ("Liability is the threshold issue to be resolved in a limitation of liability action because the exploration as to limitation is materially relevant only if liability is established.").

[21] *The 84-H*, 296 F. at 431; *accord In re Hechinger*, 890 F.2d at 207 (9th Cir.1989) (quoting *Northern Fishing & Trading Co. v. Grabowski*, 477 F.2d 1267, 1272 (9th Cir.) (quoting *The 84-H*), *cert. denied*, 414 U.S. 1079, 94 S.Ct. 597, 38 L.Ed.2d 485 (1973)); *see Colonial Sand & Stone Co. v. Muscelli*, 151 F.2d 884, 885 (2d Cir.1945) ("The right to limit is quite separate from the validity of the claim; indeed it is of no value unless the claim is valid."); *cf. Board of Comm'rs v. M/V FARMSUM*, 574 F.2d 289, 297 (5th Cir.1978) (in context of the rule of *The Pennsylvania*, "fault which produces liability must be a contributory and proximate cause of the collision, and not merely fault in the abstract").

[22] *See Culpit v. McClanahan Contractors, Inc.*, 1 F.3d 346, 348 (5th Cir.1993) ("Once an injured seaman has established that his employer's negligence *caused his injuries*, a vessel owner seeking limitation of liability must prove that it lacked privity or knowledge of the negligence." (emphasis added)), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1058, 127 L.Ed.2d 378 (1994); *Brister*, 946 F.2d at 355 ("In a limitation proceeding, once an injured seaman establishes that negligence or unseaworthiness, *caused his injuries*, the burden shifts to the vessel owner...." (emphasis added)); *see, e.g., In re Lloyd's Leasing Ltd.*, 764 F.Supp. at 1141-42.

[6] The trial court concluded that PATCO was entitled to exoneration from liability to Jarreau because he failed to prove that the collision played any part, however, small, in causing his injury. Jarreau challenges that finding. We review the court's finding for clear error.[23]

[7,8] In cases involving issues of medical causation, it is not the function of a court to search the record for conflicting circumstantial evidence which supports alternative theories of causation.[24] Jarreau presented his own live testimony and the deposition of his treating physician, Dr. Jackson. Jarreau testified that he had no prior back problems and that his back started hurting either immediately or shortly after the collision occurred. Jarreau's expert, Dr. Jackson, stated that Jarreau does suffer from a back injury, but he (Dr. Jackson) could not tell if the injury resulted from the collision.

PATCO and JWT also presented an expert witness, Dr. Landry, who had personally examined Jarreau and reviewed x-rays of Jarreau's back that were taken only one month after the accident. The x-rays satisfied Dr. Landry that Jarreau had a degenerative disc disease and that the disease was caused by trauma. But Dr. Landry was also convinced that the trauma and the condition it caused predated the collision. Thus there was expert testimony

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[23] *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1019 (5th Cir.1994) (citing *Gavagan v. United States*, 955 F.2d 1016, 1019 (5th Cir. 1992)); *see Marathon Pipe Line Co. v. M/V SEA LEVEL II*, 806 F.2d 585, 592 (5th Cir. 1986); *see, e.g., Mars v. United States*, 25 F.3d 1383, 1384 (7th Cir.1994) (reviewing for clear error finding of no medical causation).

[24] *See Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110, 80 S.Ct. 173, 175, 4 L.Ed.2d 142 (1959); *Cella v. United States*, 998 F.2d 418, 428-29 (7th Cir.1993) (explaining *Sentilles*).

that the collision did not cause Jarreau's condition but no such testimony that it did.

The district court observed that "there is no objective evidence to aid the doctors in determining whether Jarreau, in fact, was injured in the accident at issue." Thus, stated the court, the answer to the question whether Jarreau was injured as a result of the collision "is totally depend[ent] upon Jarreau's credibility when he says he had no prior back problems but had an onset of pain either immediately or shortly after the accident." Continuing, the court noted that two crew members of the M/V MISS CAROLYN testified that immediately after the accident Jarreau told them that he was not injured; and, within a week after the accident Jarreau himself gave a statement in which he denied having been injured in the collision. Based on Jarreau's conflicting statements and his manner and demeanor on the stand, the court expressly concluded that Jarreau's testimony regarding his injury was not credible. The court found as a matter of fact that the collision played no part whatsoever in injuring Jarreau.

[9] As the trial court noted, the record contains no extrinsic, objective evidence proving precisely when or how Jarreau was injured. The court thus was faced with two equally plausible but diametrically opposed possibilities: Jarreau was injured in the collision or he was not. Based largely on its assessment of Jarreau's credibility, the district court found that Jarreau was not injured in the accident. Under the totality of the evidence, we cannot say that this was clear error, particularly when reviewing this finding under the highly deferential standard applicable to

credibility calls by the trier of facts.[25]

[10] "Weighing conflicting evidence and inferences and determining the relative credibility of witnesses to resolve factual disputes is the [factfinder's] province."[26] Its decisions must be accepted if the record contains 'competent and substantial evidence fairly tending to support the verdict ... even if different inferences and conclusions also might be supported by the evidence.' "[27] In fact, the Supreme Court has admonished that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."[28] That is why we previously have written that if "[t]he district court's finding is based in part on its assessment of the credibility of the witness[ ], we will not depart from such an assessment except in the very rarest of circumstances.[29]

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[25] *U.S. Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 824 (4th Cir.1992) ("Because the determination by the district court was based upon assessments of credibility, it is deserving of the highest degree of appellate deference.").

[26] *Turnage v. General Elec. Co.*, 953 F.2d 206, 207 (5th Cir.1992).

[27] *Id.* (quoting *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 469 (5th Cir.1985)).

[28] *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

[29] *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 836 (5th Cir.1986).

This case presents no such circumstances.[30]

[11,12] Jarreau appeals an evidentiary ruling of the district court that excluded evidence of medical records. Jarreau raises this issue in his opening brief, but he fails to make the argument. A question posed for appellate review but not argued in the opening brief is waived.[31]

III

CONCLUSION

The district court did not err in denying Jarreau's motion to lift its order staying his state court proceeding. Furthermore, the district court did not err in ruling that both shipowners were entitled to exoneration from liability for Jarreau's injury based on its finding that Jarreau failed to proved that the collision caused his injury.

AFFIRMED.

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[30] Because we conclude that Jarreau failed to prove causation and thus the district court properly concluded that PATCO and JWT were entitled to exoneration from liability for his claim, we need not decide whether that court also properly decided that both shipowners were entitled to limit their liability. *See The 84-H,* 296 F. 427, 431-32 (2d Cir.1923) ("If no liability exists there is nothing to limit."), *cert. denied,* 264 U.S. 596, 44 S.Ct. 454, 68 L.Ed. 867 (1924).

[31] *United Paperworks Int'l Union v. Champion Int'l Corp.,* 908 F.2d 1252, 1255 (5th Cir. 1990); *Harris v. Plastics Mfr. Co.,* 617 F.2d 438, 440 (5th Cir.1980).

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY, ON BEHALF OF THE M/V MISS CAROLYN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY	:	CIVIL ACTION NO. 91-2591 JUDGE TRIMBLE

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W. PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	:	CIVIL ACTION NO. 91-2693 JUDGE TRIMBLE

RECEIVED
DEC 21 1993

FILED
DEC 29 1993

JUDGMENT

This matter came before the Court for trial of the claims of Harris Jarreau, Joshua Verdin and John W. Towing, Inc. on November 8, 1993 as regularly fixed by the Court. Present for trial were C. Arlen Braud, II, counsel for Joshua Verdin; John Robin and James DeSonier, counsel for Harris Jarreau; Will Bland and William Emory, counsel for John W. Towing, Inc.; and Hunter Lundy and Jackey South, counsel for Port Arthur Towing Company.

The Court, after hearing the evidence presented at trial and arguments of counsel, and for the reasons better stated in its Memorandum Ruling on December 10, 1993, hereby finds that Harris Jarreau failed to carry his burden of proof and therefore dismisses his claim, with prejudice, at Mr. Jarreau's cost. Futhermore, the Court dismisses, with prejudice, the claim of John W. Towing for indemnity arising from the payment of maintenance and cure to Harris Jarreau.

The Court, after considering the evidence, the law, the arguments of counsel and for the reasons better stated in the Memorandum Ruling of December 10, 1993, hereby renders judgment in favor of Joshua Verdin, and against Port Arthur Towing Company, and awards Joshua Verdin a sum of $12,000.00, together with legal interest from the date of Judgment.

The Court, further considering the law and the evidence in favor of John W. Towing, Inc. as to its claim of indemnity against Port Arthur Towing Company, hereby renders judgment in favor of John W. Towing, Inc. and

against Port Arthur Towing Company in the amount of $7,969.89, together with legal interest from the date of judgment.

The Court further orders that all costs of the proceeding be assessed against Port Arthur Towing Company.

THIS JUDGMENT READ, RENDERED AND SIGNED in Chambers at Lake Charles, Louisiana, this 29th day of Dec., 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

JUDGEMENT ENTERED 1-3-94
BY NC
COPY TO Lundy
Tilton
Bland
Robin
DeSonier

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

IN THE MATTER OF	:	CIVIL ACTION
THE COMPLAINT OF	:	NO. 91-2591-LC
PORT ARTHUR TOW-	:	
ING COMPANY, ON	:	JUDGE TRIMBLE
BEHALF OF THE M/V	:	
MISS CAROLYN, FOR	:	
EXONERATION FROM	:	MAGISTRATE JUDGE
OR LIMITATION OF	:	WILSON
LIABILITY	:	

CONSOLIDATED WITH

IN THE MATTER OF	:	CIVIL ACTION
JOHN W. TOWING,	:	NO. 91-2693-LC
INC., AS OWNER AND	:	
OPERATOR OF THE	:	JUDGE TRIMBLE
M/V JOHN W., PRAYING	:	
FOR EXONERATION	:	MAGISTRATE JUDGE
FROM OR LIMITATION	:	WILSON
OF LIABILITY	:	

FILED
SEP 8 1993

JUDGMENT

For the reasons set forth in this court's Memorandum Ruling, it is

ORDERED that Port Arthur Towing Company's Motion to Strike Requests for Jury Trial be and it is hereby GRANTED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 8th day of September, 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

JUDGEMENT ENTERED 9-10-93
BY Suzanne Mitchelle
COPY TO Lundy
Tilton
Bland
Robin
DeSonier

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

IN THE MATTER OF	:	CIVIL ACTION
THE COMPLAINT OF	:	NO. 91-2591-LC
PORT ARTHUR TOW-	:	
ING COMPANY, ON	:	JUDGE TRIMBLE
BEHALF OF THE M/V	:	
MISS CAROLYN, FOR	:	
EXONERATION FROM	:	MAGISTRATE JUDGE
OR LIMITATION OF	:	WILSON
LIABILITY	:	

CONSOLIDATED WITH

IN THE MATTER OF	:	CIVIL ACTION
JOHN W. TOWING,	:	NO. 91-2693-LC
INC., AS OWNER AND	:	
OPERATOR OF THE	:	JUDGE TRIMBLE
M/V JOHN W., PRAYING	:	
FOR EXONERATION	:	MAGISTRATE JUDGE
FROM OR LIMITATION	:	WILSON
OF LIABILITY	:	

FILED
SEP 8 1993

MEMORANDUM RULING

Presently before the court is Port Arthur Towing Company's Motion to Strike Request for Jury Trial. This action is brought under the Limitation of Liability Act,, 46 U.S.C. §183 *et seq.* It is an admiralty proceeding and is to be tried by the court without a jury. *See Luhr Bros., Inc. v. Gagnard,* 765 F.Supp. 1264 (W.D. La. 1991); *Cooper/T. Smith Stevedoring & Co., Inc. v. D/B ASHLEIGH C.* 735 F. Supp. 689 (E.D. La. 1990). The Motion to Strike Request for Jury trial is GRANTED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 8th day of September, 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 9-10-93
BY SM
TO Lundy
Tilton
Bland
Robin
De Sonier

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40102

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING CO. ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

PORT ARTHUR TOWING CO., Etc.,
Plaintiff-Appellee,

versus

JOHN W. TOWING, INC., ET AL.,
Defendants,

HARRIS JARREAU,
Defendant-Appellant,

and

JOSHUA VERDIN,
Defendant-Appellee.

FILED
MAR 20 1995

* *

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

JOHN W. TOWING, INC., Etc.,
Plaintiff-Appellee,

versus

GERALD PREJEANT, ET AL.,
Defendants,

HARRIS JARREAU,
Defendant-Appellant,

and

JOSHUA VERDIN,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

---

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 01/18/95), 5 Cir., ( ), ( ) F.3d ( )

(March 20, 1995)

Before DUHE' WIENER and STEWART, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having rquested that the Court be polled on rehearing en banc, (FRAP and Local rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

BEST AVAILABLE COPY

(2)

No. 94-2122

Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

HARRIS JARREAU,
Petitioner,

V.

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent,

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. When a party voluntarily abandons efforts to have a stay lifted and the matter proceeds to trial, is the party estopped from arguing that the stay should have been lifted.

2. When the aggregate of the damages being sought by all claimants exceed the value of the concursus, is the district court required to lift the stay where less than *all* of the claimants enter into a stipulation that protects the shipowner which has filed a Complaint in federal court seeking to limit its liability?

3. Whether the district court's decision not to lift the stay, which was affirmed by the court of appeals, was correct?

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No. 94-2122

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

HARRIS JARREAU,
Petitioner,

V.

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent,

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

John W. Towing, Inc., respondent, respectfully prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 20, 1995, be denied.

STATEMENT OF THE CASE

While Respondent, John W. Towing, agrees with the majority of Petitioner's rendition of the Statement of the Case, John W. Towing takes this opportunity to correct the following inaccuracies and omissions in Petitioner's Statement.

Subsequent to the June 15, 1991 collision between the M/V MISS CAROLYN and the M/V JOHN W., John W. Towing, in its representative capacity as owner and operator of the M/V JOHN W., filed its Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Western District of Louisiana. Port Arthur Towing Company (hereinafter "PATCO") also filed a Complaint for Exoneration From or Limitation of Liability on behalf of the M/V MISS CAROLYN. These Complaints were consolidated into the present action.

On April 12, 1993, the personal injury plaintiffs, including Petitioner, filed a Motion to Lift Stay. On April 22, 1993, the district court denied the Motion to Lift Stay and specifically found that the Stipulation failed to recognize John W. Towing's claim and that the Stipulation failed to set up a priority sufficient to cover all of the claimants. On May 10, 1993, Petitioner filed a second Motion to Lift Stay. On May 21, 1993, the district court denied the second Motion to Lift Stay.

Thereafter, on June 2, 1993, a telephone conference was held between the court and counsel for the respective parties. As reflected by the district court's June 2, 1993

Minute Entry, during the telephone conference, Petitioner advised the court that Petitioner had abandoned Petitioner's efforts to lift the stay. (Appendix at A-1)

Petitioner has incorrectly advised this Honorable Court that John W. Towing was not willing to enter into a stipulation that would allow for the stay to be lifted. To the contrary, there were several conferences between counsel for the respective parties and the district court judge in order to formulate an appropriate stipulation. Counsel for John W. Towing and counsel for PATCO even traveled to counsel for Petitioner's office in Mandeville, Louisiana for a face-to-face meeting to work out the terms for the stipulation. At this meeting, the parties agreed to acceptable terms for the stipulation; however, when the proposed stipulation was prepared and forwarded, Petitioner failed to incorporate into the Stipulation the terms that had been previously agreed upon.

Contrary to the assertions contained in Petitioner's Statement of the Case, John W. Towing was not only willing to enter into a stipulation, counsel for John W. Towing met with counsel for Petitioner and agreed to the terms of a stipulation that would be acceptable to all concerned. However, for whatever reason, Petitioner either failed to or refused to incorporate the agreed upon terms in any of the proposed Stipulations. Thereafter, on June 2, 1993 Petitioner voluntarily abandoned his efforts to have the stay lifted.

The issues of limitation and liability were tried on June 30, 1993. John W. Towing was exonerated from any

and all liability. On November 8, 1993, PATCO's limitation action and damages were tried. On December 29, 1993, the district court rendered its Judgment, finding that Petitioner had failed to carry his burden of proof and dismissing his claim. Petitioner appealed the district court's final Judgment and on January 18, 1995, the Court of Appeals rendered an opinion affirming the district court. Petitioner then sought a rehearing as well as a rehearing *en banc* which were both denied by the Court of Appeals.

SUMMARY OF THE ARGUMENT

1. The Stipulation proposed by Petitioner failed to include all of the claimants, in particular, John W. Towing. As such, the Stipulation failed to protect PATCO's rights to limit its liabilities by exposing PATCO to a multiple claimant/inadequate fund situation had Petitioner been permitted to pursue his action in state court. Accordingly, the district court's decision to deny Petitioner's Motion to Lift Stay was not only proper, based on the jurisprudence, the district court would have abused its discretion had it lifted its earlier Order staying Petitioner's state court proceeding.

2. Prior to trial, Petitioner advised the district court that Petitioner was voluntarily abandoning his efforts to have the stay lifted. Accordingly, the district court was no longer faced with the question of whether the stay should be lifted and the matter proceeded to trial before the district court. Since Petitioner was no

longer seeking to have the stay lifted, the district court cannot be considered to have committed an error by failing to lift the stay. Petitioner voluntarily abandoned all efforts to have the stay lifted and Petitioner should now be estopped from arguing that the district court erred by not lifting the stay.

REASONS TO DENY THE WRIT

I.

THE DISTRICT COURT PROPERLY REFUSED TO LIFT THE STAY

Respondents, John W. Towing and PATCO, invoked the federal court's exclusive admiralty jurisdiction by filing their limitation of liability actions in federal district court. Courts have repeatedly held that the question of limitation of liability is cognizable only in admiralty. *See, Magnolia Marine Transport Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992); *In Re Two "R" Drilling Co.*, 943 F.2d 576, 578 (5th Cir. 1991); *Luhr Bros., Inc. v. Gagnard*, 756 F.Supp. 1264 (W.D.La. 1991); *Kattelman v. Otis Engineering Corp.*, 696 F.Supp. 1111, 1113 (E.D.La. 1988); *In Re Complaint of Midland Enterprises, Inc.*, 886 F.2d 812 (6th Cir. 1989). However, the exclusive federal court jurisdiction which arises from the Limitation of Liability Act, 46 U.S.C. App. §181, *et seq.*, directly conflicts with the right to choose the forum and the right to a jury trial reserved to plaintiffs under the Savings and Suitors clause. Courts addressing this conflict have

consistently recognized that both of these provisions are fundamental to admiralty law. Therefore, federal courts must attempt to reconcile the two statutes whenever possible. *See, In Re Complaint of Dammers and Vanderheide*, 660 F.Supp. 153 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 750 (2nd Cir. 1988); *Luhr Bros., supra.*; *Magnolia Marine Transport, supra; In Re Two "R" Drilling, supra.*

There are two sets of circumstances which courts have consistently found to be exceptions to the exclusive jurisdiction of the federal court. The first situation is where there are multiple claimants and an adequate limitation fund, thereby alleviating the need for a concursus. The second situation is where there is a single claimant who stipulates to the authority of the federal court to resolve the issues relating to the limitation of liability. As stated by the Fifth Circuit in *Magnolia Marine Transport, supra*:

> A claimant who wishes to pursue a state court claim ... must first make certain stipulations in the admiralty court to preserve the shipowner's rights. The claimant must stipulate that the admiralty court reserves exclusive jurisdiction to determine all issues related to the shipowner's right to limit liability, and that no judgment against the shipowner will be asserted to the extent it exceeds the value of a limitation fund.

Magnolia Marine Transport, 964 F.2d at 1575; see also, *In Re Complaint of Dammers and Vanderheide*, 836 F.2d 750, 755 (2nd Cir. 1988).

However, neither of these exceptions expressly provides for the situation presented to the district court in the present case -- multiple claimants and an inadequate fund. It is well settled that in multiple claimant cases, the admiralty court should only allow state court claims to proceed if the proper stipulations are in place. *See, Magnolia Marine Transport*, 964 F.2d at 1576; *In Re Complaint of Dammers and Vanderheide*, 836 F.2d at 755-760. District courts are prevented by law from lifting the stay unless all of the claimants, in addition to the usual stipulations, stipulate to the priority in which all of the claimants are to be satisfied out of the limitation fund. *See, S&E Shipping Corp. v. Chesapeake & O.R. Co.*, 678 F.2d 636, 644 (6th Cir. 1982); *Magnolia Marine Transport*, 964 F.2d at 1576.

In cases involving multiple claimants (as is the case in the present case) all claimants are required to enter into the stipulation before the stay can be lifted. *See, ODECO Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 549 (5th Cir. 1960). However, in the present case it is undisputed that all of the claimants had not entered into the stipulations that were presented to the district court.

On several occasions, Petitioner submitted stipulations and moved the district court to lift the stay. John W. Towing opposed the Motions to Lift Stay on the ground that stipulations submitted by Petitioner failed to take into consideration the fact that John W. Towing was also a claimant in this matter. John W. Towing had a claim against PATCO to recover maintenance and cure paid as a

result of the collision and to recover any sums paid by John W. Towing to its injured crewmembers to settle their personal injury claims.

As a claimant in this matter with valid and legitimate claims against PATCO, John W. Towing stood on equal footing with Petitioner to recover from PATCO all sums paid by way of maintenance and cure and to recover any sums paid by way of settlement. John W. Towing's claim had to be included and properly protected in the stipulations. *See, ODECO Oil & Gas Co.*, 4 F.3d at 405; *Gorman v. Cerasia*, 2 F.3d 519, 525 (3rd Cir. 1993).

John W. Towing was prepared to enter into such a stipulation if and when Petitioner drafted a stipulation that properly considered and protected John W. Towing's claim. In fact, several conferences were held with respective counsel in an attempt to reach such a stipulation. Counsel for John W. Towing and PATCO even travelled to Mandeville, Louisiana, to sit down face to face with counsel for Petitioner in an attempt to reach such a stipulation. At the meeting in Mandeville, the parties agreed to the terms of a proposed stipulation that would be acceptable by all of the claimants. However, following the meeting, the proposed stipulation drafted by Petitioner failed to include the terms that the parties had discussed and agreed to at the meeting.

In spite of the efforts of counsel for John W. Towing and PATCO to arrive at a stipulation that protected John W. Towing and set up a priority for payment out of the limitation fund, the stipulations offered by Petitioner repeatedly failed to properly address these areas.

Based on the fact that the proposed stipulations not only failed to contain the proper protections, but also failed to include all of the claimants, the district court denied the Motions to Lift Stay. Jarreau did not appeal the denials of the Motions to Lift Stay. In *Treasure Salvors, Inc. v. Unidentified Wreck and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981), the Fifth Circuit held that an interlocutory appeal from a denial of a motion to lift stay is proper. In *Treasure Salvors*, the court stated:

> Prior to the unification of the admiralty rules with the federal rules it was generally presumed that the admiralty judge lacked the chancellor's power to order injunctive relief; therefore, the question whether appeals could be taken from such orders in admiralty cases under Section 1292 (a)(1) was seldom posed. This question did, however, arise in the context of injunctions entered in limitation of liability proceedings which barred prosecution of other actions while the limitation action proceeded. We held that such injunctions, and orders modifying them, were appealed while under Section 1292(a)(1).

Id. at 564-565, citing *Complaint of Mucho K. Inc.*, 578 F.2d 1156 (5th Cir. 1978); *Beal v. Waltz*, 309 F.2d 721 (5th Cir. 1962); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960).

Rather than appealing the district court's denial of the Motion to Lift Stay, Jarreau voluntarily agreed to the

jurisdiction of the district court and proceeded forward at trial on the issues of liability, limitation and exoneration, as well as the subsequent trial on damages. As a result, Jarreau has now lost his right to contest this issue on appeal.

Notwithstanding the fact that Jarreau lost his right to contest this issue on appeal, the record clearly shows that the district court was faced with a multiple claimant case and presented with stipulations that failed to include all of the claimants and failed to protect the rights and interests of all the parties involved. Accordingly, the district court denied the Motions to Lift Stay. The Court of Appeal recognized this fact and affirmed the district court's ruling.

II.

JARREAU VOLUNTARILY ABANDONED HIS EFFORTS TO HAVE THE STAY LIFTED AND IS NOW ESTOPPED FROM ARGUING THAT THE STAY SHOULD HAVE BEEN LIFTED

On multiple occasions, Petitioner moved the district court to lift the stay. On no less than two occasions, the district court advised Petitioner as to specific shortcomings of Petitioner's motion. Furthermore, counsel for John W. Towing and PATCO participated in several conferences with counsel for Petitioner (including travelling to Mandeville, Louisiana), in an attempt to reach a stipulation. During this meeting, the specific shortcomings of the proposed stipulations were discussed and various suggests were made to counsel for Petitioner as to how the stipulations could be

drafted to properly account for John W. Towing's claim and provide the proper protection necessary for the district court to lift the stay. In spite of guidance and suggestions made by the district court, counsel for John W. Towing and counsel for PATCO, Petitioner either failed to or refused to prepare a stipulation that was sufficient for the district court to lift the stay.

On June 2, 1993, the district court held a telephone conference with counsel for the respective parties to once again discuss the status of the efforts to arrive at a stipulation sufficient to lift the stay. During this telephone conference, counsel for Petitioner advised the district court that Petitioner had voluntarily abandoned his efforts to arrive at a stipulation, thereby abandoning his attempts to have the stay lifted. At that point, it was agreed that the trial on the issues of limitation and liability would go forward on June 30, 1993. (Appendix A at A-1)

The issues of limitation and liability were tried on June 30, 1993. Damages were tried on November 8, 1993. At no point during either trial did Petitioner reurge the Motion to Lift Stay.

Even assuming for the sake of discussion that the district court should have lifted the stay or that Petitioner did not lose his chance to appeal when he failed to appeal the denial of the Motions (a position that John W. Towing vehemently disputes and that finds no support in either the facts or the law), Petitioner is bound by the fact that he voluntarily abandoned his efforts to have the stay lifted.

Accordingly, Petitioner is now estopped from arguing that the district court erred by not lifting the stay.

It is absurd for Petitioner to now take the position that the district court committed reversible error by failing to lift the stay when in fact Petitioner had advised the district court that he was no longer pursuing his efforts to have the stay lifted. It is abundantly clear that the district court did not commit error and, therefore, the district court must be affirmed on this point.

CONCLUSION

John W. Towing, Inc. respectfully submits that the district court's findings and rulings are fully supported by the record and are clearly not erroneous. The Court of Appeal reviewed this matter and affirmed the district court, specifically finding that the district court did not error in denying Petitioner's Motion to Lift the Stay. Therefore, and based on the foregoing reasons and arguments, it is respectfully submitted that this Honorable Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

In the Matter of the Complaint of Port Arthur Towing Company, on behalf of M/V MISS CAROLYN, for Exoneratation From or Limitation of Liability	* * * * * * *	Civil Action No. 91-2591 Judge Trimble Magistrate Judge Wilson

Consolidated With

In the Matter of John W. Towing, Inc., as owner and Operator of the M/V JOHN W., Praying for Exoneration from or Limitation of Liability	* * * * * * *	Civil Action No. 91-2693 Judge Trimble Magistrate Judge Wilson

MINUTE ENTRY

A telephone conference was held on June 2, 1993 in the above-captioned matter with counsel for all parties participating.

The parties informed the undersigned that they have abandoned efforts to agree upon stipulations which would allow the lifting of the stay. Therefore, the Limitation of Liability Action will go forward on June 30, 1993, and the court will try the issues as previously outlined.

With regards to the Motion for Contempt and Sanctions filed by Hunter Lundy against Joshua Tilton for filing an action in Texas, Mr. Lundy informed the court that he would ask his client about withdrawing the contempt charges if Mr. Tilton dismisses the action filed in Texas state court without prejudice. Mr. Tilton agreed to pay Mr. Lundy's expenses for filing this motion if the motion is withdrawn. These parties will notify the court of their decision in this matter.

The undersigned informed the parties that he is willing to allow Commander Cole to testify concerning the applicable navigation rules if Commander Cole is made reasonably available to the defendants for deposition. The defendants are entitled to retain an expert of their own on these issues, and this expert should be made reasonably available to the plaintiffs for deposition.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana this 2d day of June, 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

Copy Sent Date 6-2-93
By: IN
To: Lundy
Bland
DeSonier
Robin
Tilton

(3)

NO. 94-2122

In the
Supreme Court of the United States

OCTOBER TERM, 1995

HARRIS JARREAU
PETITIONER

V.

IN THE MATTER OF THE COMPLAINT OF
PORT ARTHUR TOWING COMPANY ON BEHALF OF
THE M/V MISS CAROLYN FOR EXONERATION
FROM LIMITATION OF LIABILITY
RESPONDENT

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC.,
AS OWNER AND OPERATOR OF THE M/V JOHN W.,
PRAYING FOR EXONERATION FROM
OR LIMITATION OF
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT
PORT ARTHUR TOWING COMPANY'S
BRIEF IN OPPOSITION

HUNTER W. LUNDY, #8938 *
JACKEY W. SOUTH, #21125

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit conflicts with applicable decisions of this Court.

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONS

The parties to these proceedings are Petitioner, Harris Jarreau, an adult citizen and resident of the State of Louisiana, and Respondent, Port Arthur Towing Company, a privately held corporation. Fredeman Shipyard, Inc. is a subsidiary of Port Arthur Towing Company.

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STATUTE:

Limitation of Liability Act, 46 U.S.C. App. § 181, *et seq.* 4

No. 94-2122

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HARRIS JARREAU
PETITIONER

V.

IN THE MATTER OF THE COMPLAINT OF
)RT ARTHUR TOWING COMPANY ON BEHALF OF
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V MISS CAROLYN FOR EXONERATION FROM
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RESPONDENT

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IN THE MATTER OF JOHN W. TOWING, INC.,
AS OWNER AND OPERATOR OF THE M/V JOHN W.,
PRAYING FOR EXONERATION FROM
OR LIMITATION OF
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT,
PORT ARTHUR TOWING COMPANY'S
BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 15, 1991, a collision occurred between the M/V JOHN W., a tugboat owned and operated by John W. Towing, Inc. (hereinafter referred to as "JWT"), and the M/V MISS CAROLYN, a tugboat owned and operated by Port Arthur Towing Company (hereinafter referred to as

"PATCO"). Both PATCO and JWT filed suit under the Limitation of Liability Act, 46 U.S.C. App. §§ 181-189 (1988), with the United States District Court for the Western District of Louisiana, Lake Charles Division. The district court issued a Writ of Injunction, which stayed the concurrent state court action.

Petitioner, Harris Jarreau, was one of four (4) crewmembers who filed claims in the limitation action. Additionally, JWT filed a claim against PATCO for damages sustained by the M/V JOHN W in the collision.

The claims of two (2) crewmembers were settled. The remaining crewmembers, Petitioner and Joshua Verdin, filed a motion to lift the stay. Petitioner and Verdin entered into stipulations, which would enable them to proceed in the forum of their choice. The stipulations were not adequate as JWT was not a party to the stipulations. Petitioner, Verdin and JWT attempted to negotiate mutually agreeable stipulations; however, agreement was never reached. The three parties informed the district court that they had abandoned their efforts to agree upon stipulations. Thus, the district court denied the motion to lift the stay. This denial was not appealed. The district court bifurcated the trial, and, after the issues of liability, limitation and exoneration were tried, the court exonerated JWT from all liability and found PATCO solely responsible for the collision. Following a bench trial on damages, the district court found that claimant, Verdin, had carried his burden of proof and awarded Verdin $12,000.00 for his injuries. Verdin did not appeal from this award, and the same has been settled in total.

The district court found that Petitioner's testimony regarding his injury was not credible. The court specifically held that Petitioner failed to establish by a preponderance of the evidence that the collision caused his injuries. Thus, the court exonerated PATCO from liability to Petitioner.

Petitioner filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit. In a reported decision, *Complaint of Port Arthur Towing M/V MISS CAROLYN,* 42 F.3d 312 (5th Cir. 1995), the Fifth Circuit affirmed the district court's decision. Subsequently, the Fifth Circuit denied Petitioner's Petition for Panel Rehearing and Petition for Rehearing En Banc.

Following the collision in question, Captain Wilbur Garner and Robert Gibson, crewmembers of the M/V MISS CAROLYN, boarded the M/V JOHN W to provide assistance. Captain Garner spoke with Petitioner, who told Garner that no crewmember aboard the M/V JOHN W was injured. Later, Petitioner told Gibson that he was not hurt but was going to sue as a result of the collision.

Approximately five days after the collision, Petitioner gave a statement wherein he again denied sustaining any injury to his back, head, legs or arms. At trial, Petitioner attempted to explain this statement by testifying that he was stunned and caught up in the excitement following the collision. However, Petitioner later testified that he was no longer stunned when he gave this statement. Petitioner did not seek immediate medical attention following the collision. There were no witnesses to Petitioner's alleged injury.

Although Petitioner claimed to have sustained a disabling back injury as a result of the collision, he continued to ride his 1000 pound Harley-Davidson motorcycle with a gang named "The Henchmen", until he was injured in a motorcyle accident three (3) months after the collision in question. Further, Petitioner participated in at least three (3) physical altercations subsequent to the collision with no apparent problems.

REASON FOR DENYING THE PETITION

The decision of the United States Court of Appeals for the Fifth Circuit does not conflict with applicable decisions of this Court.

Petitioner cites Rule 10.1(c) as the basis for his Petition for Writ of Certiorari. It appears that Petitioner is contending that the Fifth Circuit in *Complaint of Port Arthur Towing M/V MISS CAROLYN,* 42 F.3d 312 (5th Cir. 1994) "...decided a federal question in a way that conflicts with applicable decisions of [the Supreme] Court." However, there is no support for Petitioner's contention.

Petitioner cites three United States Supreme Court cases; *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963); *Engle v. Davenport,* 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813 (1926); and *Panama R. Co. v. Vasquez,* 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed 1085 (1926). The Fifth Circuit's decision in the instant cause does not conflict these decisions. Neither *Fitzgerald, Engle* or *Vasquez* are limitation of liability cases. Therefore, Petitioner's reliance upon the same is misplaced. Further, the instant cause does not present special and important reasons warranting review on writ of certiorari.

The district court and the Fifth Circuit decisions in the instant cause were well reasoned and correct. PATCO and JWT filed suit under the Limitation of Liability Act, 46 U.S.C. App. § 181, *et seq.* Appropriately, the district court stayed the concurrent state court action. The instant cause is precisely the circumstance which the Limitation of Liability Act addresses. As stated by this Court:

> It is, therefore, crystal clear that the operation of the [Limitation of Liability] Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight. And, as is pointed out in *British Transport Commission, supra,* where the fund created pursuant to the Act is inadequate to cover all damages and the owner has sought the protection of the Act the issues arising from the disaster could be litigated within the limitation proceeding. Otherwise the purpose of the Act, i.e., limitation of the owner's liability, might be frustrated. Only in this manner may there be a marshalling of all the statutory assets remaining after the disaster and a concurse of claimants.

Lake Tankers Corporation v. Henn, 354 U.S. 147, 151-152, 77 S.Ct. 1269, 1272, 1 L.Ed.2d 1246 (1957).

There are exceptions which allow a claimant(s) to pursue an action outside the limitation proceeding in the forum of his choice. When a claimant(s) enter into stipulations sufficient to protect the shipowner's interest, the claimant(s) should be allowed to proceed in state court. As stated by the Fifth Circuit:

> Claims may proceed outside the limitations action (1) if they total less than the value of the vessel, or (2) if [all] claimants stipulate that the federal court has exclusive jurisdiction over the limitation of liability proceeding and that [the claimants] will not seek to enforce a greater damage award until the limitation action has been heard by the federal court.

Complaint of Port Arthur Towing M/V MISS CAROLYN, 42 F.3d 312, 316 (5th Cir. 1995), quoting *Odeco Oil and Gas Co.*, 4 F.3d at 404 (citing *Lake Tankers Corp.*, 354 U.S. at 151-53, 77 S.Ct. at 1271-72); *See In Re Two "R" Drilling Co.*, 953 F.2d 576, 578 (5th Cir. 1991) (analyzing sufficiency of claimants' stipulations).

In the instant cause, all claimants did not enter into the appropriate stipulations. The stipulations proposed by Petitioner and Verdin were inadequate to protect PATCO's right to limit its liability. Thus, the district court's refusal to lift the stay in this limitation proceeding was proper.

Petitioner voluntarily abandoned his efforts to enter into stipulations which would have allowed the district court to lift the stay. (Appendix 1). Furthemore, Petitioner did not appeal the denial of the motion to lift the stay, although an interlocutory appeal from the denial of Petitioner's motion to lift the stay would have been proper. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981). Rather than appealing the denial of the motion to lift the stay, Petitioner submitted himself to the jurisdiction of the district court and allowed the trial on the issues of liability, limitation and exoneration and the subsequent trial on damages to proceed. Petitioner had his day in court. The distirct court found that Petitioner did not prove that he sustained his alleged injury as a result of the collision. The district court specifically found that Petitioner was not credible and exonerated PATCO. The district court's decision was affirmed by the Fifth Circuit in a well-reasoned opinion.

CONCLUSION

Respondent followed all the rules and requirements of law in filing its limitation of liability action. Therefore, the stay imposed by the district court was proper. All claimants did not enter into adequate stipulations, which would have enabled the district court to lift the stay. Petitioner did not appeal the denial of the motion to lift the stay. Rather, Petitioner submitted himself to the jurisdiction of the district court and the issues of exoneration, limitation and liability and damages were tried by the district court.

Petitioner has not demonstrated that the Fifth Circuit's opinion conflicts with applicable decisions of this Court. Further, there are no other special and important reasons which warrant review by this Court.

For this and all the foregoing reasons, Respondent, Port Arthur Towing Company, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Filed
Jun 2 1993

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY, ON BEHALF OF M/V MISS CAROLYN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NO. 91-2591 JUDGE TRIMBLE MAGISTRATE JUDGE WILSON

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NO. 91-2693 JUDGE TRIMBLE MAGISTRATE JUDGE WILSON

MINUTE ENTRY

A telephone conference was held on June 2, 1993 in the above-captioned matter with counsel for all parties participating.

The parties informed the undersigned that they have abandoned efforts to agree upon stipulations which would allow the lifting of the stay. Therefore, the Limitation of Liability Action will go forward on June 30, 1993, and the court will try the issues as previously outlined.

With regards to the Motion for Contempt and Sanctions filed by Hunter Lundy against Joshua Tilton for filing an action in Texas, Mr. Lundy informed the court that he would ask his client about withdrawing the contempt charges if Mr. Tilton dismisses the action filed in Texas state court without prejudice. Mr. Tilton agreed to pay Mr. Lundy's expenses for filing this motion if the motion is withdrawn. These parties will notify the court of their decision in this matter.

The undersigned informed the parties that he is willing to allow Commander Cole to testify concerning the applicable navigation rules if Commander Cole is made reasonably available to the defendants for deposition. The defendants are entitled to retain an expert of their own on these issues, and this expert should be made reasonably available to the plaintiffs for deposition.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana this 2nd day of June, 1993.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES
MAGISTRATE JUDGE